IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-798

MAX DEAN, individually and as a candidate for Congress (7th District Michigan) on the United States Labor Party ticket, MELVIN P. BROWN, individually and as candidate for United States Senator (Michigan) on the United States Labor Party ticket, PETER SIGNORELLI and SUSANNE DALTO, individually, and as candidates respectively for the office of Governor and Lieutenant Governor (Michigan) on the United States Labor Party ticket, and KENNETH DALTO individually and as State Chairman of the United States Labor Party and the UNITED STATES LABOR PARTY, a political party committee,

v. Petitioners,

RICHARD AUSTIN, in his official capacity as Secretary of State of Michigan, BERNARD J. APOL, in his official capacity as Director of Elections, and Secretary of the Michigan State Board of Canvassers, NANCY CHASE, WALLACE RILEY, JESSE DILLARD and WALTER OLIVER in their capacities as Members of the STATE BOARD OF CANVASSERS for the STATE OF MICHIGAN and the STATE OF MICHIGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

v.

RICHARD AUSTIN, in his official capacity as Secretary of State of Michigan, BERNARD J. APOL, in his official capacity as Director of Elections, and Secretary of the Michigan State Board of Canvassers, NANCY CHASE, WALLACE RILEY, JESSE DILLARD and WALTER OLIVER in their capacities as Members of the STATE BOARD OF CANVASSERS for the STATE OF MICHIGAN and the STATE OF MICHIGAN,

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Richard Austin, Secretary of State of Michigan, Bernard J. Apol, Director of Elections and Secretary of the Michigan State Board of Canvassers, the members of the State Board of Canvassers, and the State of Michigan, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United

States Court of Appeals for the Sixth Circuit which was entered on July 16, 1979.

OPINIONS BELOW

The opinions of the United States District Court and the United States Court of Appeals for the Sixth Circuit are correctly cited in the Petition and are contained in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is an elections case which sought placement of a minor party on an election ballot rendered moot when the election is completed and the test articulated in *Weinstein* v *Bradford* is not fulfilled?

2. In considering the application of an elections statute, are lower courts correct in relying on this Court's summary affirmance of the constitutionality of the challenged statute?

3. Did the operation of the Michigan Minor Party Qualification Statute at the 1978 primary election create an impossible burden which prevented the U.S. Labor Party from obtaining a place on the general election ballot?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the United States Constitution and the Michigan Election Law are adequately set forth in the Petition.

STATEMENT OF FACTS

This case is the second challenge to the Michigan Minor Party Qualification Statute, 1976 PA 94; MCLA 168.685, 168.560a and 168.560b; MSA 6.1685, 6.1560(1) and 6.1560(2).

A new political party must file petitions containing the signatures of registered and qualified electors equal to not less than 1% nor more than 4% of the number of votes that the successful candidate for Secretary of State received at the last election. After the party is certified to appear on the ballot at the August primary qualification election, which is held simultaneously with the Democratic and Republican primaries in August of even numbered years, the party must receive votes cast by three-tenths of one percent of the total number of voters appearing at that primary election.

When the party achieves that modicum of support, the candidates of that party, as certified by the party's convention, appear on the November general election ballot. If at that November election, the principal candidate of the minor party receives 1% of the total number of votes cast for the successful candidate for Secretary of State at the last preceding election, that party is automatically qualified to have their party vignette and candidates listed on the next general election ballot.

In *Hudler* v *Austin*, 419 F Supp 1002 (E.D. Mich., (1976), *aff'd* 430 US 924; 92 S Ct 1541; 51 L Ed2d 769 (1977), a three-judge court upheld the constitutionality of the challenged statute but required that Michigan place all minor parties on the general election ballot in 1976. The Court reasoned that there was not sufficient time for minor parties to adequately prepare for a party qualification election which would require them to muster sufficient support to receive three-tenths of

one percent of the total number of votes cast at the 1976 primary election.

Subsequently, the United States Labor Party and other minor parties appeared on the general election ballot and only one of those parties, the American Independent Party, received sufficient votes which qualified the party for automatic ballot status in the 1978 general election.

Without bothering to follow the available state procedures for a recount, petitioners filed a complaint in Federal District Court alleging, in essence, that the ballot configuration at the 1978 primary election was confusing and prevented the supporters of the U.S. Labor Party from casting a valid vote for that party. They further alleged that the Michigan election officials knew or should have known that the configuration was confusing and that these officials failed to properly inform the electorate as to the procedure for voting for new political parties.

A hearing was held in the Federal District Court, and the petitioners gave limited testimony that several of their party's candidates campaigned and that there was limited distribution of material in certain areas of the state. Bernard Apol, Director of the Elections Bureau of the State of Michigan, testified extensively that he had personally addressed county, township and city clerk's conventions stressing the importance of training election workers as to the procedures involved in conducting the party qualification election. Mr. Apol conferred with members of the U.S. Labor Party as well as members of other minor parties and as a result of these meetings, made certain changes in the election instruction placards posted in each precinct throughout the state and included additional warnings on the suggested form for absentee ballots prepared by his office and circulated by county and city clerks. Mr. Apol also worked with the Director of Public Information for

the Michigan Department of State on a press release which was distributed to every daily newspaper in the state and to the 550 news organizations subscribing to the service of the Michigan Press Association. This press release was the only press release to the general media which the Secretary of State issued regarding the procedures for the August, 1978 election.

Additionally, in the Polling Place, the instructional memoranda circulated to election officials throughout the state, a very specific article was included indicating to election workers that they should thoroughly train their workers on the procedure involved and be prepared to assist and answer questions from voters about the new procedures.

Mr. Apol then testified as to the existence of two large sample ballots in each precinct which duplicate the face of the ballot or configuration of the mechanical voting machine or electronic apparatus in the precinct. In addition, in each precinct there are two placards which clearly set forth instructions for voting including detailed instructions on how to vote the partisan section of the ballot with warnings indicating that a voter may vote in only one section of the partisan ballot.

Evidence was also introduced which indicated that various absentee ballots throughout the state contained the same explicit instructions and numerous warnings to the effect that a voter would invalidate his ballot if he voted in more than one partisan section of the ballot. Evidence developed at the hearing showed that the computer punch card apparatus had numerous warnings and clearly instructed voters to vote in only one partisan section of the ballot. Mechanical voting machines were used in approximately 60% of all precincts voting in Michigan. Those machines contained a mechanical lock-out device which prevented voters from voting in more than one partisan section of the ballot.

Based on the evidence presented, the District Court found that the voting instructions and procedure for placing a new political party on the ballot were not so deceptive as to make it impossible for a voter desiring to place a new political party on the November ballot to register his vote. The District Court also found that the voting instructions and procedures did not operate, in fact, to make it impossible for a party using reasonably diligent efforts to comply with the requirements for access to the ballot.

Twenty-five days after the District Court ruled, petitioners served a Claim of Appeal and Brief in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit Court of Appeals filed an Opinion on July 16, 1979, after briefing and oral argument by the parties. The Court of Appeals found that the appeal was moot because the U.S. Labor Party had sought a preliminary injunction requiring the Michigan Secretary of State to place the U.S. Labor Party candidates on the November, 1978 ballot.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION OF THE COURT OF APPEALS THAT THIS MATTER IS MOOT WAS CLEARLY CORRECT BASED UPON PRIOR DECISIONS OF THIS COURT.

Petitioners argue that this case is one of the exceptions to the mootness doctrine and assert that it was impossible tc obtain an adequate review of their constitutional claims prior to the election. Although the only relief sought was an injunction ordering the placement of the U.S. Labor Party on the November, 1978 general election ballot, petitioners argue that this case is one of the exceptions which belong in the category of cases which present constitutional issues which are "capable of repetition, yet evading review." *Southern Pacific Terminal Co* v *ICC*, 219 US 498; 31 S Ct 279; 55 L Ed 310 (1911).

The Court of Appeals specifically found that the controversy was moot because it did not meet the test for the exception to the mootness doctrine. In reaching its decision, the Court cited *Illinois State Board of Elections* v *Socialist Workers Party*, ... US ....; 99 S Ct 983; 59 L Ed2d 230 (1979), which relied upon *Weinstein* v *Bradford*, 423 US 147; 96 S Ct 346; 46 L Ed2d 350 (1975).

Petitioners argue that the Court of Appeals misread *Illinois State Board of Elections, supra*, and that the mootness discussion in that case applied only to an unauthorized agreement entered into by the Chicago Board of Elections and not to the ballot access problem presented in that case.

However, in *Illinois State Board of Elections, supra,* the Court generally discussed mootness and the necessity to meet both foils of the *Weinstein* test.

> "In *Weinstein* v *Bradford*, 423 US 147, 149, 46 L Ed2d 350, 96 S Ct 374 (1975), we elaborated on this exception, holding that a case is not moot when:
>
> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was reasonable expectation that the same complaining party would be subjected to the same action again." 59 L Ed2d 243

This Court found that although the first branch of the test was satisfied, the appellant had not presented any evidence which created a reasonable expectation that the Chicago Board would again repeat its purportedly unauthorized actions. This Court found that the appellants' conclusory assertions that the actions were capable of repetition were not sufficient to satisfy the *Weinstein* test.

The Court of Appeals found that the conclusory allegations of the U.S. Labor Party, that they would again be subjected to the same actions, were not sustained by the evidence. The Court specifically noted that the good faith of the defendant state officials has not been challenged; the U.S. Labor Party has not indicated that the state officials intended to discriminate against that party; and lacking allegations and proof of that type of behavior, there is no reasonable expectation of repetition. The Court specifically found that while there may have been mistakes in the adequacy of the instructions at the 1978 primary election, there was no reason to believe that an effort would not be made to change those instructions in the future.

Petitioners have not alleged either bad faith or discrimination, and therefore, have no basis for their assertion that the state will not attempt to draft instructions which are more readily understood. In addition, petitioners would posit an ongoing course of conduct detrimental to their interests. However, one event is not an ongoing course of conduct, and petitioners complain of the first election held pursuant to Act 94.

THE LOWER COURTS CORRECTLY RELIED UPON THIS COURT'S SUMMARY AFFIRMANCE OF HUDLER V AUSTIN.

Petitioners argue that the District Court and the Court of Appeals erred when they relied upon this Court's summary affirmance of *Hudler* v *Austin, supra*. Petitioners assert that the lower courts have effectively precluded them from ever bringing to this Court the issues which they wish to litigate.

Petitioners attempt to restrict the impact of *Hudler* and assert, "that unnecessary to the decision was the *dicta* concerning the constitutionality of Act 94." However, the opinion in *Hudler* begins by indicating that "plaintiffs in this action challenge the constitutionality of certain of Michigan's election statutes, i.e., MCLA § 168.685 and §§ 168.560a and 168.560b, . . ." 419 F Supp 1004.

The *Hudler* opinion indicates that plaintiffs challenged Public Act 94 as impermissibly burdening the right of individuals to associate for the advancement of political beliefs secured by the First and Fourteenth Amendments, as violative of the equal protection clause of the Fourteenth Amendment, and as contravening the due process clause of the Fourteenth Amendment in that the Act was imposed after plaintiffs had completed or nearly completed gathering petitions under the previously existing statutory requirements. It is clear that the plaintiffs made three arguments which were addressed by the Court, that the third argument related to waiving the requirements of Public Act 94 as to the 1976 election, and, that the greatest portion of the *Hudler* opinion is addressed to the constitutional arguments raised by the plaintiffs.

The Court specifically concluded in *Hudler* not only that the U.S. Labor Party should be placed on the November, 1976 general election ballot but also that Act 94 is a proper exercise of legislative discretion and does not offend the Constitution except as to its application to the general election for November, 1976. 419 F Supp 1014.

In *Hudler*, the U.S. Labor Party had its opportunity to challenge the constitutionality of Act 94. The constitutionality of that Act was upheld by a three-judge federal court and that decision was summarily affirmed by this Court. Petitioners argue that summary affirmance is of weak precedential value. However, petitioners seek again to challenge the constitutionality of the very Act which has been found constitutional.

In *Illinois State Board of Elections, supra*, this Court also discussed the effect of summary affirmance.

". . . As we stated in *Mandel* v. *Bradley*, 432 U.S. 173, 176, 55 L Ed 2d 199, 97 S Ct 2238 (1977), the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, *ibid.*, quoting *Fusari* v. *Steinberg*, 419 U.S., at 391-392, 42 L Ed 2d 521, 95 S Ct 433 (Burger, C.J., concurring), and no more may be read into our action than was essential to sustain that judgment. . . ." 59 L Ed2d 240

However, the precise issue determined by *Hudler* is that Act 94 does not violate the Constitution.

Both the District Court and the Court of Appeals applied *Hudler* to the relief sought by the petitioners in this case. In denying the injunction requested by the U.S. Labor Party, the District Judge found a low probability that they could succeed on the case on the merits. In specifically reasoning by analogy, the District Court found that the requirements upheld in *Hudler* encompassed the explaining of the mechanical voting procedure and that the burden on the petitioners was not materially aggravated by the actions of the state.

On appeal, the Sixth Circuit indicated that it had no power to rehear the constitutionality of Public Act 94 but that it could consider a new issue.

"If there is a new issue not precluded from our review by the Supreme Court affirmance just referred to, it is that the procedures for implementing Public Act 94 in the 1978 election were unconstitutional in their impact upon the legislative scheme." 602 F2d 123, Appendix to the Petition, p 19a

Petitioners' argument is misplaced when they assert that the

District Court and the Court of Appeals failed to fulfill their function and merely relied upon *Hudler, supra,* and refused to consider the petitioners' constitutional claims. However, those courts were correct in refusing to again consider arguments relating to the merits of Act 94.

THIS CASE DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION AND CONCERNS ONLY THE APPLICATION OF A MICHIGAN STATUTE PREVIOUSLY UPHELD AS CONSTITUTIONAL.

The duty of the state to protect the integrity of its ballot and to require a preliminary showing of a significant modicum of support has been articulated by this Court in *Jenness* v *Fortson*, 403 US 431; 91 S Ct 1970; 29 L Ed2d 554 (1971):

"The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad suppport, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams* v *Rhodes, supra.*

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by

the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders."

Of similar import is *Bullock* v *Carter*, 405 US 134; 92 S Ct 849; 31 L Ed2d 82 (1972). Although the Court found that a Texas statutory filing fee scheme denied equal protection, the Court indicated that the state has a legitimate interest in regulating the number of candidates on the ballot.

"The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness* v *Fortson*, 403 US, at 422, 29 L Ed 2d at 562; *Williams* v *Rhodes*, 393 US, at 32, 21 L Ed 2d at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of run-off elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. . . ." (footnote omitted) 405 US 145

Ballot access must be open to minor parties but it can be subject to reasonable requirements. *Lubin* v *Panish*, 415 US 709, 719; 94 S Ct 1315; 39 L Ed 2d 702 (1973).

In *Hudler*, the District Court found that the Michigan Legislature had made a legislative determination that a new standard had to be established which would more accurately gauge minor party support and that the Legislature sought to further the state's compelling interest in keeping the ballots within limits understandable to voters and preventing the clogging of election machinery. The District Court found that Act 94 provides real, not merely theoretical access, to the ballot and that if a new party demonstrates the requisite modicum of support, the state will accept the attendant burden, expense, and disadvantage of paper ballots or a modification of its voting procedures.

The *Hudler* opinion recognized that the efforts of the Michigan Legislature were by definition designed to restrict candidate and party access, a power previously upheld by this Court.

"As we indicated in *Rosario*, the Constitution does not require the state to chose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the state with profound consequences for the entire citizenry merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Storer* v *Brown*, 415 US 724; 94 S Ct 1274; 39 L Ed 2d 714 (1974)

While the state may not impose an impossible burden, it may select an effective means of limiting ballot access. However, the means chosen may not be so excessive or impractical that it always or almost always excludes parties with *significant support* from the ballot. *American Party of Texas* v *White*, 415 US 767; 94 S Ct 1296; 39 L Ed 2d 744 (1973), citing *Jenness* v *Fortson*, *supra*, 415 US 783.

The Michigan statute requires significant effort on the part of a minor party to organize supporters and demonstrate substantial support. However, that does not automatically

mean that an impermissible burden has been imposed on the minor party.

> "Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization." *American Party of Texas, supra*, 415 US 787.

The District Court found that the voting instructions and procedures utilized at the August, 1976, primary election were not so deceptive as to make it impossible and did not operate, in fact, to make it impossible for the U.S. Labor Party using reasonably diligent efforts to comply with the statutory requirements. The District Court measured the evidence presented at the hearing against the standard articulated in *Hudler*. The District Court specifically stated that the burden imposed by Act 94 is "simply one of publicizing a new primary election to the electorate in general and plaintiff's constituents in particular." Measured against the statutes upheld in *American Party of Texas, supra*, the activity required by Act 94 to mobilize minor party support does not require such an overwhelming expenditure of time and effort as to fall beyond the scope of the "reasonably diligent efforts" standard in *Storer, supra*.

The evidence presented by the petitioners at the three day hearing indicated that they did not carry their burden of mobilizing and educating those individuals who wished to vote for one of the minor parties. The relief sought by the petitioners would cast a responsibility on the state which must be assumed by the minor party.

The method chosen by the state is effective. However, Act 94 provides a vehicle for new parties to qualify for the general ballot and requires a minimal showing of support, three-tenths of one percent of the votes cast.

Petitioners assert that the remedy in *Griffin* v *Burns*, 570 F2d 1065 (CA 1, 1978), should be applicable. However, in *Griffin* and the few other cases in which federal courts ordered corrective measures, last minute changes in election procedures were held to be fundamentally unfair. The procedures mandated by Act 94 were not utilized in 1976 due to the short time frame, and petitioners then received a remedy analogous to that in *Griffin, supra*.

To the extent that petitioners argue that there were counting irregularities or mechanical difficulties, a fully adequate state corrective procedure exists and petitioners chose not to utilize the recount procedures which were available.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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